

1 in the state superior court. *Id.* at 3-4. The habeas petition makes no showing that Mr. Peralta
2 presented the claims contained in his habeas petition to the high state court and given the recency of
3 his conviction, it is unlikely that he did.

4 **III. DISCUSSION**

5 A state prisoner cannot obtain federal habeas corpus relief unless he has exhausted all
6 available state court remedies. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b)-(c). The
7 exhaustion requirement is intended to give the state courts the first opportunity to remedy a
8 constitutional violation. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In order to provide the state
9 courts with the requisite “opportunity” to consider his federal claims, a prisoner must “fairly
10 present” his claims to each appropriate state court for review, including a state supreme court with
11 powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted).

12 Mr. Peralta has submitted nothing showing he presented his federal habeas claims to the
13 highest Washington State court for review. Rather he attached correspondence from the United
14 States Supreme Court and Court of Appeals for the Ninth Circuit showing both courts declined
15 to review his case for lack of exhaustion. It is clear that since Mr. Peralta was just sentenced on
16 September 20, 2010, the Washington State Supreme Court could not have had the opportunity to
17 address his claims. Accordingly, Mr. Peralta’s claims are not exhausted and he cannot pursue
18 them in a federal habeas action at this point.

19 Although a pro se litigant is normally granted the chance to file an amended complaint to
20 cure deficiencies, the failure to exhaust state remedies cannot be cured by amendment. *See James*
21 *v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000) (holding that a pro se habeas petitioner is entitled to a
22 statement of the grounds for dismissal and an opportunity to amend the petition unless it clearly
23 appears that the deficiency cannot be overcome by amendment); *see also* Rule 4 of the Rules

1 Governing § 2254 Proceedings (“If it plainly appears from the petition and any attached exhibits
2 that the petitioner is not entitled to relief in the district court, the judge must dismiss the
3 petition . . .”). The Court therefore recommends this matter be dismissed without prejudice. If
4 Mr. Peralta believes that he has in fact exhausted his claims by presenting them to the Washington
5 State Supreme Court, he should set forth his explanation as to that fact in his written objections to
6 this Report and Recommendation, if any.

7 **CERTIFICATE OF APPEALABILITY**

8 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
9 dismissal of the petition only after obtaining a certificate of appealability (COA) from a district
10 or circuit judge. A COA may be issued only where a petitioner has made “a substantial showing
11 of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this
12 standard “by demonstrating that jurists of reason could disagree with the district court's
13 resolution of his constitutional claims or that jurists could conclude the issues presented are
14 adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327
15 (2003).

16 Under this standard, the Court finds that no reasonable jurist would conclude that Mr.
17 Peralta is entitled to relief. Accordingly, the Court recommends a COA not be issued, and that
18 pursuant to Rule 11 of the Rules Governing § 2254 cases, the district court deny issuance of a
19 COA if it dismisses this matter for failure to exhaust. Mr. Peralta should address whether a COA
20 should be issued in his written objections, if any, to this Report and Recommendation.

21 **CONCLUSION**

22 The Court recommends: (1) Mr. Peralta’s habeas petition be **DISMISSED** without
23 prejudice and (2) a COA not be issued. A proposed order accompanies this Report and

1 Recommendation. The Clerk is directed to provide a copy of this Report to Mr. Peralta.

2 DATED this 22nd day of November, 2010.

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5 BRIAN A. TSUCHIDA
6 United States Magistrate Judge
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